



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 27, 2004

Mr. Miles T. Bradshaw  
Feldman & Rogers, L.L.P.  
5718 Westheimer, Suite 1200  
Houston, Texas 77057

OR2004-1474

Dear Mr. Bradshaw:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196845.

The Royal Independent School District (the "district"), which you represent, received two requests from the parent of a district student for information relating to the requestor's child. In particular, the requests ask for the following information: billing information from attorneys, consultants, and other individuals relating to the child; records and staff communications from Royal High School pertaining to the child; training records of staff working with the child; correspondence relating to the child; lesson plans, instructional materials, reading curriculum materials, computer software, and information relating to instructional programs and trainings utilized by a named teacher and other district personnel providing instruction or services to the child during the 2003-2004 school year; communication logs and sign-in sheets of professionals providing services to the child; records of total costs expended by the district Special Education Department for educational services for the child. You state most of the responsive information has been or will be provided to the requestor. You claim, however, that portions of the remaining requested information are excepted from disclosure under section 552.103 of the Government Code and the attorney-client privilege.<sup>1</sup> We have considered your claims and reviewed the submitted information.

We begin by noting that the submitted information is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable

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<sup>1</sup> We note that you raised the attorney-client privilege in conjunction with section 552.101 of the Government Code. This office has determined that the attorney-client privilege, as encompassed in Rule 503 of the Texas Rules of Evidence, does not fall within the purview of section 552.101. Open Records Decision No. 676 at 2 (2002).

program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A).

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). As the requestor is the parent of the child at issue, the requestor has a right of access to the submitted records under FERPA. Accordingly, the records at issue generally may not be withheld pursuant to an exception to disclosure under the Public Information Act (the "Act"). *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); Open Records No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Thus, the submitted information is not excepted from disclosure under section 552.103 of the Government Code.

With respect to your claim under the attorney-client privilege, however, the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right of access under FERPA to information about the parent's child does not prevail over a school district's right to assert the attorney-client privilege. Therefore, we next consider whether the district may withhold any of the submitted information under the attorney-client privilege.

We note that most of the submitted documents consist of attorney fee bills that are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, the information in the submitted attorney fee bills must generally be released unless it is expressly confidential under other law or protected by the attorney-client privilege. The Texas Supreme Court has held that the Texas Rules of

Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Rule 503 of the Texas Rules of Evidence.

Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

A governmental body seeking to withhold information from public disclosure pursuant to the attorney-client privilege must: (1) demonstrate that the document at issue is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) demonstrate that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Open Records Decision No. 676 (2002).

Upon review of your arguments and the submitted information, we find you have demonstrated that some of the information in the submitted attorney fee bills is protected by the attorney-client privilege. Accordingly, we have marked the portions of the submitted information that the district may withhold under Rule 503 of the Texas Rules of Evidence.

Next, we note that the documents marked AG00027 through AG00030 are not subject to section 552.022. Thus, we address your claim under the attorney-client privilege for this information pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege pursuant to section 552.107(1), a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). You state that this information consists of confidential communications among district personnel made for the purpose of facilitating the rendition of professional legal services to the district. Furthermore, you indicate that the confidentiality has been maintained. Upon review of your arguments and the information at issue, we find that you have demonstrated that the information you have marked in documents AG00027 through AG00030 is protected by the attorney-client privilege. Accordingly, we find that the district may withhold this information in documents AG00027 through AG00030 pursuant to section 552.107(1) of the Government Code.

In summary, we have marked the portions of the submitted attorney fee bills that the district may withhold under Rule 503 of the Texas Rules of Evidence. We have marked the portions of documents AG00027 through AG00030 that the district may withhold pursuant to section 552.107(1) of the Government Code. The remainder of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 196845

Enc: Submitted documents

c: Mr. Johnny Hackett  
P.O. Box 295  
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(w/o enclosures)